ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

RECEIVED

DEC 19 1991

Federal Communications Commission
Office of the Secretary

91-221

In the Matter of	)	
	)	
Review of the Policy Implications of the Changing Video Marketplace	)	MM Docket No. 91-221
	)	

To: The Commission

REPLY COMMENTS OF FOX BROADCASTING COMPANY

Fox Broadcasting Company ("Fox"), submits these Reply Comments in the above-captioned matter. See Notice of Inquiry, 6 FCC Rcd 4961 (1991) (the "Notice").

I. INTRODUCTION

More than three dozen parties filed comments in response to the Commission's Notice. Predictably, given the open-ended nature of the Inquiry, commenters expressed a wide range of viewpoints covering an equally wide range of issues. But the record makes clear that action is needed to bring Commission rules and policies in line with the competitive and technological realities of the video marketplace.

Fox will address only two issues in these brief reply comments. The first -- the necessity for changes in the current compulsory copyright license scheme -- while not strictly a matter of Commission regulation, is nevertheless critical to the future competitive structure of the video marketplace. The other -- the Commission's cross-interest policy -- seems to have been ignored by commenters, but must be addressed if the Commission is to effectuate the changes, advocated by numerous parties, in the regulatory structure governing local and regional broadcast ownership.

II. THE CABLE COMPULSORY COPYRIGHT LICENSE HAMPERS THE ABILITY OF BROADCASTERS TO COMPETE AND SHOULD BE REPEALED

Among the issues raised in the Notice is whether "repeal of the compulsory license for cable television and/or implementation of a scheme of transmission consent [would] enable local stations to compete more effectively?" 6 FCC Rcd at 4963 (¶ 10). It is more than a little ironic that in their initial comments, both the National Association of Broadcasters and the National Cable Television Association support retention of the cable compulsory copyright license. Fox respectfully disagrees.

Fox notes at the outset that the Commission previously has reviewed the issue of the cable compulsory copyright license and recommended to Congress that it be abolished. Compulsory Copyright License for Cable Retransmission, 4 FCC Rcd 6562 (1989). The same factors that gave rise to that conclusion now compel its reaffirmation.

The affirmative case for repealing the compulsory license is easy to state. First, the compulsory copyright license was established to provide the then infant cable industry with access to programming. This clearly is no longer a valid concern given the proliferation of cable programming sources. Second, as currently structured, the compulsory license invidiously discriminates between mature stations, whose cable carriage patterns were established prior to 1972, and newer stations that have signed on since that date. Third, the perceived transactional difficulty envisioned in 1976 relative to cable performance rights has long since evaporated. Today, cable operators freely contract -- without government assistance -- with dozens of satellite delivered cable networks. These networks operate as rights clearing intermediaries for the programs they telecast. Plainly, broadcasters could perform that same rights clearing function today.

Moreover, by empowering local broadcasters to function as rights clearing intermediaries, Congress could foster the development of much needed dual revenue streams for local broadcasters. Significantly, these additional revenue streams would arise out of free market transactions made possible by a de-regulatory action.

It is clear that the emergence of new distribution technologies such as MMDS and DBS, and recent court decisions, will combine to compel Congress either to adopt additional compulsory licenses or to initiate a transition back to a free market environment. The satellite license in Section 119 of the Copyright Act is slated to "sunset" in 1994. MMDS is not currently covered by any license. Thus, the *status quo* in which cable enjoys a license while its competitors do not, is not a stable long-term situation.

The only logical and appropriate policy response is for the government to extricate itself from the television copyright marketplace. So long as government licensing continues in place, program owners and exhibitors will be unable to effectuate contracts for exclusive exhibition rights and/or exclusive exhibition windows. Yet it is clear that such exclusive rights/windows will be a principal means by which different television exhibitors seek to distinguish their services and to compete in the increasingly competitive television marketplace.

Significantly, substantial segments of the cable industry itself understand the need to phase out compulsory licensing. Attached to these comments is a letter dated October 30, 1991 from Dr. John C. Malone, President, Chief Executive Officer of Tele-Communications Inc., affirming his company's recognition of the inevitability of compulsory license repeal.

III. ANY RELAXATION OR REPEAL OF THE BROADCAST MULTIPLE AND CROSS-OWNERSHIP RULES MUST BE ACCOMPANIED BY THE ELIMINATION OF THE CROSS-INTEREST POLICY

Numerous parties responded to the Commission's request for comments on the implications of increasing competition in the video marketplace for the broadcast multiple ownership and cross-ownership rules. See Notice at 4962 (¶ 5). Although commenters addressed the issue with varying degrees of specificity, a majority generally favored relaxation or repeal of broadcast ownership restrictions. Several commenters observed that the one-to-a-market and duopoly rules (see 47 C.F.R. § 73.3555(a) and (b)), in particular, prevent broadcasters from entering into potentially beneficial ownership and operating arrangements on the local and regional levels. 1/

Yet none of the parties advocating modification of the broadcast ownership restrictions addressed the continuing impact on local and regional ownership and operating issues of the Commission's cross-interest policy, which operates independent of, and as a supplement to, the rules. 2/

1/ See, e.g., Comments of Group W at 8-13 (broadcasters should be permitted "to recognize economies of operation" on local and regional levels); Comments of INTV at 24-28 (broadcasters' competitive position and public interest contributions would be enhanced by "combination of studio facilities, cross-utilization of skilled employees, and the ability to sell advertising on more than one channel"); Comments of NAB at 31-35 ("efficiencies afforded by joint operations" would enable broadcasters "to shore up marginal operations in an increasingly competitive environment").

2/ The cross-interest policy addresses "instances in which an individual or entity has a 'meaningful' relationship in two

[Footnote continued]

Significantly, although both the scope and the applicability of the cross-interest policy were substantially reduced in 1989, 3/ the Commission left in place and solicited further comments regarding the propriety of the policy's continued applicability to "key employees" and to nonattributable equity interests and joint ventures. See Further Notice, supra. In the nearly three years following release of the Further Notice, however, the Commission has taken no further action in its cross-interest proceeding, which remains pending.

Thus, even if the broadcast ownership restrictions were modified, as requested by numerous commenters, continued application of the Commission's cross-interest policy would deter broadcasters from entering into innovative local and

---

2/ [Footnote continued]

competing media outlets serving substantially the same area." Policy Statement, Reexamination of the Cross-Interest Policy, 4 FCC Rcd 2208 (¶ 5) (1989); see also Notice of Inquiry, FCC 87-188 (released June 5, 1987) at ¶¶ 2-4 (policy developed "to examine relationships not proscribed by the Commission's early attribution rules, but which nevertheless raise competitiveness concerns").

3/ See Policy Statement, supra. The Commission concluded that several factors, "including changes in the mass media marketplace, modifications of the attribution rules, and the adequacy of other legal remedies" (id. at 2210-11 ¶ 20)), rendered the policy unnecessary and contrary to the public interest with respect to consulting positions, advertising agency representative relationships and time brokerage arrangements.

regional ownership and operating arrangements. Consequently, modification of the rules would not produce the beneficial results envisioned by commenters unless and until the Commission acts on the changes under consideration in its pending reevaluation of the policy. See Further Notice of Inquiry/Notice of Proposed Rule Making, Reexamination of the Commission's Cross-Interest Policy, 4 FCC Rcd 2035 (1989) (the "Further Notice").

If the Commission concludes that competitive developments justify the relaxation or repeal of local and regional restrictions on broadcast station ownership, the same developments clearly mandate the elimination of the remaining "key employee" and nonattributable interest/joint venture provisions of the cross-interest policy, which supplement those rules. 4/ Indeed, the principal issue raised by this Inquiry in connection with the broadcast ownership restrictions -- that is, whether the Commission's regulatory scheme for the video marketplace is appropriate in the face of significant market changes -- is virtually identical to that raised in the

---

4/ The Commission has already made clear by modification of its attribution guidelines that nonattributable equity interests do not rise to a level of concern sufficient to require regulatory intervention. See Ownership Attribution, 97 FCC2d 997, 1008-09, 1020-24 (1984).

Commission's reevaluation of the vestiges of the cross-interest policy. 5/

Ultimately, in order to effectuate any of the changes in the broadcast ownership rules under discussion in this Inquiry, the Commission must remove nonattributable equity interests and joint ventures, as will as the cross-utilization of key management personnel, from the coverage of the cross-interest policy.

Accordingly, any relaxation of the one-to-a-market or duopoly rules requires elimination of the remaining provisions of the cross-interest policy by concluding its pending proceeding in MM Docket No. 87-154, or, alternatively, by incorporating the record of that proceeding into the record of the present Inquiry.

5/ In the pending cross-interest proceeding, for example, the Commission has questioned whether the possibility of anticompetitive behavior by nonattributable investors or joint venture participants would be eliminated by "marketplace constraints" and "the competitive nature of local media markets." See Further Notice, 4 FCC Rcd at 2036-38 (¶¶ 12, 17). With respect to "key employees," the Commission has sought comment on whether "the public interest benefits derived by permitting marginal stations to resolve financial or programming difficulties through the use of experienced employees would be sufficient on balance to justify permitting such cross-interests." Id. at 2036 (¶ 9).

IV. CONCLUSION

Fox appreciates the Commission's attention, in this proceeding, to the linkages that exist between and among the various segments of, and participants in, the contemporary video marketplace. Fox is hopeful that the Commission will promptly take action to ensure that its television rules and policies remain "in step with current industry circumstances" as the industry enters the 21st century.

Respectfully submitted,

FOX BROADCASTING COMPANY

By William S. Reyner, Jr.

William S. Reyner, Jr.
Mace J. Rosenstein

HOGAN & HARTSON
Columbia Square
555 13th Street, NW
Washington, D.C. 20004-1109
202/637-5600

December 19, 1991

Regency Plaza One
Suite 600
4643 S. Ulster Street
Denver, Colorado 80237

Terminal Annex
Post Office Box 5630
Denver, Colorado 80217
(303) 721-5500

TELE-COMMUNICATIONS, INC.

John C. Malone, Ph.D.
President and Chief Executive Officer

October 30, 1991

Barry Diller, Chairman & CEO
Fox, Inc.
10201 West Pico Blvd.
Los Angeles, CA 90035

Dear Barry:

Congratulations on your "open letter" in Broadcasting magazine. Over the longer term, repeal of the compulsory license is probably inevitable, particularly if a "must carry" regime appears untenable.

We would be happy to participate in a study of transitioning into a free market. Our initial concerns are that the transition be lengthy enough to accommodate needed contractual changes among broadcasters and the production community, and that some accommodation be made for the relatively few cable customers in small rural systems. However, in the final analysis, the free market will be much fairer for all programming packagers - both broadcast and cable - and should create a level playing field for all.

Please let us know if further meetings are planned.

Sincerely,

John C. Malone
President & CEO

JCM/st

<u>CERTIFICATE OF SERVICE</u>

I, Jillian Wing, a legal secretary at the law firm of Hogan & Hartson, hereby certify that on this 19th day of December, 1991, I caused to be served by first-class mail, postage prepaid, a copy of **REPLY COMMENTS OF FOX BROADCASTING COMPANY** addressed to the following:

* Chairman Alfred C. Sikes
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

* Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

* Commissioner Sherrie P. Marshall
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, D.C. 20554

* Commissioner Andrew C. Barrett
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

* Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

* Terry L. Haines
Chief of Staff
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

*/By Hand

* Kenneth Robinson
Senior Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

* Lauren J. Belvin
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

* Robert Corn-Revere
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

* Brian F. Fontes
Special Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

* Peter D. Ross
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

* Byron F. Marchant
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

* Robert E. Branson
Senior Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

*/By Hand

* Michelle C. Farquhar
Senior Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

* John C. Hollar
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

* Robert L. Pettit, General Counsel
Federal Communications Commission
Room 614
1919 M Street, N.W.
Washington, D.C. 20554

* Renee Licht
Deputy General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

* Robert M. Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, D.C. 20554

* Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
Room 314
1919 M Street, N.W.
Washington, D.C. 20554

* William H. Johnson, Deputy Chief
Mass Media Bureau
Federal Communications Commission
Room 314
1919 M Street, N.W.
Washington, D.C. 20554

*/By Hand

* Linda Townsend Solheim
Director
Office of Legislative Affairs
Federal Communications Commission
1919 M Street, N.W.
Room 808
Washington, D.C. 20554

Henry L. Bauman
Executive Vice President & General Counsel
National Association of Broadcasters
1771 N Street, NW
Washington, D.C. 20036

L. Lowry Mays
President
Clear Channel Communications, Inc.
P.O. Box 659512
San Antonio, TX 78265-9512

James J. Popham
General Counsel
Association of Independent Television Stations, Inc.
1200-18th Street, N.W., Suite 502
Washington, D.C. 20036

Veronica A. Haggart
Corporate Vice President
Motorola Inc.
1350 I Street, N.W., Suite 400
Washington, D.C. 20005

Martin P. Messinger
Senior Chief Counsel
Westinghouse Broadcasting Company, Inc.
888 Seventh Avenue
New York, NY 10106

Mark W. Johnson
CBS Inc.
1634 I Street, N.W.
Washington, D.C. 20006

Fritz E. Attaway
Senior Vice President
Motion Picture Association of America, Inc.
1600 Eye Street, N.W.
Washington, D.C. 20006

*/By Hand

Kenneth E. Satten
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for Bonneville International Corp.

Roger G. Berk, Jr., President
Group One Communications, Inc.
WAKC-TV
853 Copley Road
Akron, Ohio 44320

Richard E. Wiley
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Cedar Rapids Television Company *et al.*

Robert A. Beizer
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for Tribune Broadcasting Company

David M. Hunsaker
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
McLean, VA 22101-0539
Counsel for Freedom of Expression Foundation, Inc. and the Media Institute

J. Laurent Scharff
Reed Smith Shaw & McClay
1200-18th Street, N.W.
Washington, D.C. 20036
Attorneys for Radio-Television News Directors Association

Anthony L. Pharr
Office of Communication of the United Church of Christ
2000 M Street, N.W., Suite 400
Washington, D.C. 20036

Michael R. Gardner
1150 Connecticut Avenue, N.W., Suite 710
Washington, D.C. 20036
Counsel for Pinelands, Inc.

Clifford M. Harrington
Fisher, Wayland, Cooper and Leader
1255-23rd Street, N.W., Suite 800
Washington, D.C. 20037
Counsel for Fisher Broadcasting, Inc.

Howard M. Liberman
Arter & Hadden
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006
Counsel for Abry Communications

James C. Dowdle
Chairman
Television Operators Caucus, Inc.
901-31st Street, N.W.
Washington, D.C. 20007-3838

Robert L. Hoegle
Olwine, Connelly, Chase, O'Donnell & Weyher
1701 Pennsylvania Avenue, N.W., Suite 1000
Washington, D.C. 20006
Counsel for Tele-Communications, Inc.

Edwin M. Durso
Executive Vice President
ESPN, Inc.
ESPN Plaza
Bristol, CT 06010

Jeffrey Pash
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for National Football League

Quincy Rodgers
Associate General Counsel
General Instrument Corporation
1899 L Street, N.W., Suite 500
Washington, D.C. 20036

David Cosson
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Vincent J. Curtis, Jr.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Counsel for Associated Broadcasters, Inc.
and Galloway Media, Inc.

David Earle
General Manager
WTZA-TV Associates
721 Broadway
Kingston, NY 12401

John G. Kompas
Executive Director
Community Broadcasters Association
P.O. Box 26736
Milwaukee, WI 53226-0736

David J. Brugger
President
America's Public Television Stations
1350 Connecticut Avenue, Suite 200
Washington, D.C. 20036

Paula Jameson
General Counsel
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314

Mark E. Chopko
General Counsel
United States Catholic Conference
3211 Fourth Street, N.E.
Washington, D.C. 20017

James Donahue
Teledemocracy Project
P.O. Box 19405
Washington, D.C. 20036

Howard Monderer
National Broadcasting Company, Inc.
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Sam Antar
Vice President, Law & Regulation
Capital Cities/ABC, Inc.
77 West 66th Street
New York, NY 10023

Gregory M. Schmidt
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for Network Affiliated Stations Alliance

Diane B. Burstein
National Cable Television Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Paul E. Symczak
General Counsel
Corporation of Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004

Lynn M. Crakes
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006
Counsel for Univisa, Inc.

Robert T. Sutton
Home Shopping Network, Inc.
P.O. Box 9090
Clearwater, FL 34618-9090

Bernard Koteen
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Jillian Wing

Jillian Wing